

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:)

Pickens Coal, Inc.)

Barge Loading Facility)

Tuscaloosa, Tuscaloosa County, Alabama)

NPDES Permit No. AL0043524)

Consent Order No. - -CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Pickens Coal, Inc. (hereinafter "the Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code § 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act, Ala. Code § 22-22-1 through 22-22-14 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Permittee operates a mining facility known as the Barge Loading Facility (hereinafter "Facility") located in Tuscaloosa, Tuscaloosa County, Alabama. The Facility discharges pollutants from point sources into the Black Warrior River and groundwater, waters of the State.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code § 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code § 22-22-1 through 22-22-14 (2006 Rplc. Vol.).

4. The Department reissued National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number AL0043524 (hereinafter "Permit") to the Permittee on

December 30, 2003, establishing limitations on the discharge of pollutants from point sources, designated therein as outfalls 001 and 002, into the black Warrior River and groundwater, waters of the State. The Permit requires that the Permittee monitor its discharge and submit periodic Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. In addition, the Permit requires that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permit.

5. Part II.B.10.a of the Permit requires that the Permittee file a complete application for permit reissuance within at least 180 days prior to the Permit's expiration if the Permittee intends to discharge beyond the expiration date of the Permit. The expiration date of the Permit was December 31, 2008. Therefore, the Permittee's application was due to be submitted to the Department no later than July 4, 2008. The Department received an untimely application for the Permittee's Permit reissuance on December 12, 2008.

6. As set forth in ADEM Admin. Code r. 335-6-6-.06, the terms and conditions of an expiring NPDES permit are automatically extended pending issuance of a new permit if the Permittee has submitted a timely and complete application for reissuance of its NPDES permit and if any subsequent delay in permit issuance is not caused by the actions of the Permittee.

7. Part II.B.10.b of the Permit states that "Failure of the Permittee to apply for permit reissuance at least 180 days prior to permit expiration will void the automatic continuation of the expiring permit provided by ADEM Administrative Code Rule 335-6-6-.06 and, should the permit not be reissued for any reason, any discharge after discharge of this permit will be an unpermitted discharge."

8. The Department did not receive a timely and complete permit application from the Permittee as provided above. Therefore, the Permittee's Permit expired on December 31, 2008. As a result of the Permit expiration, all discharges from outfalls 001 and 002 to the Black Warrior River and groundwater have been unpermitted since January 1, 2009. Any further discharges will remain unpermitted until the date of the Permit reissuance.

9. The Department issued a Notice of Violation (hereinafter "NOV") to the Permittee on

January 6, 2009, that addressed the submittal of late DMRs, pit's unpermitted status, as well as deficiencies and violations noted during the Department's December 15, 2008, inspection.

10. The Permittee addressed all the inspection deficiencies and violations in a response to the Department dated February 5, 2009.

11. The Permittee consents to abide by the terms of the following Consent Order.

12. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

13. Pursuant to Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Permittee; the economic benefit that delayed compliance may have conferred upon the Permittee; the nature, extent and degree of success of Permittee's efforts to minimize or mitigate the effects of such violation upon the environment; the Permittee's history of previous violations; and the ability of the Permittee to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATION:** In consideration of this factor, the Department noted that the Permittee violated its Permit by failing to submit a timely application for permit renewal. The Department has no evidence of irreparable harm to the environment or of any threat to the health and safety of the public as a result of the violations stated herein.

B. THE STANDARD OF CARE: In consideration of this factor, the Department noted that the Permittee did not exhibit a standard of care commensurate with applicable regulatory requirements.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department has been unable to ascertain if there has been a significant economic benefit to the Permittee as a result of these violations.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Permittee to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: Historical violations were considered in the development of the civil penalty.

F. THE ABILITY TO PAY: The Permittee has not alleged an inability to pay the civil penalty.

ORDER

THEREFORE, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it, as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Permittee agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay the Department a civil penalty in the amount of \$2,000.00 to settle the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. The Permittee agrees to comply with all terms, limitations, and conditions of the Permit that expired on December 31, 2008, until such time as the reissued Permit becomes effective. The Permittee agrees to comply with all terms, limitations, and conditions of the reissued Permit beginning on the effective date of that Permit.

D. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

E. The parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations, which are cited in this Consent Order.

F. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

G. For purposes of this Consent Order only, the Permittee agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and that are beyond the reasonable control of the Permittee, including its contractors and consultants, that could not be overcome by due diligence (i.e., causes that could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance,

changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

H. The Department and the Permittee agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility that would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed by other Orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate, and the Permittee shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

I. The Department and the Permittee agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

J. The Department and the Permittee agree that this Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

K. The Department and the Permittee agree that final approval and entry into this Consent Order is subject to the requirement that the Department provide notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

L. The Department and the Permittee agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or by the Environmental Management Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

M. The Department and the Permittee agree that any modifications of this Consent Order must be agreed to in writing signed by both parties.

N. The Department and the Permittee agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligations to comply in the future with any permit.


Executed in duplicate, with each part being an original.

Pickens Coal, Inc.

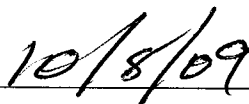
**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

By: _____

By: _____

Its: _____

Its: _____

Date: _____

Date: _____